

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-2213

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

FRANK ATKINS,

Appellant.

Docket No. 74-2213

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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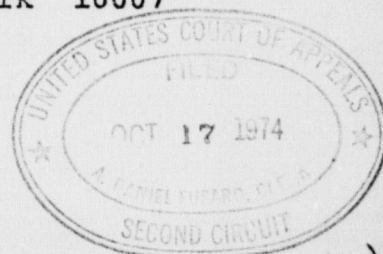


TABLE OF CONTENTS

Table of Cases and Other Authority	i
Question Presented	1
Statement Pursuant to Rule 28(3)	
Preliminary Statement	2
Statement of Facts	2
Argument	
It was error to permit into evidence proof that appellant had escaped from custody	9
Conclusion	13

TABLE OF CASES

<u>Cantrell v. United States</u> , 323 F.2d 613 (D.C. Cir. 1963) ...	11
<u>Michelson v. United States</u> , 333 U.S. 469 (1948)	11
<u>United States v. Adcock</u> , 447 F.2d 1337 (2d Cir.), <u>cert.</u> <u>denied</u> , 404 U.S. 939 (1971)	12
<u>United States v. Febre</u> , 425 F.2d 107 (2d Cir.), <u>cert.</u> <u>denied</u> , 400 U.S. 849 (1970)	12
<u>United States v. Gaines</u> , 460 F.2d 176 (2d Cir.), <u>cert.</u> <u>denied</u> , 409 U.S. 883 (1972)	13
<u>United States v. Johnson</u> , 254 F.2d 175 (2d Cir. 1948)	11

OTHER AUTHORITY

1 Wignore, ON EVIDENCE, §117 (3d ed. 1940)	9
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Docket No. 74-2213

BRIEF FOR APPELLANT

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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether it was error to introduce, as evidence of motive
for unlawfully attempting to cash a check, appellant's prior
escape from custody.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles M. Metzner) rendered on September 4, 1974, convicting appellant of aiding and abetting in the utterance of a forged United States Treasury obligation, and possession of an unregistered firearm with no serial number, in violation of the Federal gun control laws. Appellant was sentenced to a one-year term of imprisonment on each count, the terms to run concurrently.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Frank Atkins, the appellant in this case, and his brother Kenneth were indicted for uttering a forged United States Treasury check.* The theory of the Government's case against appellant was that he was an aider and abetter. The primary evidence against him was his confession. Appellant alone was

*They were also indicted for possession of stolen mail. The jury acquitted appellant of that charge.

indicted for possession of a gun in violation of the Federal gun control laws.*

Howard Stein, owner of a check cashing store, testified that on June 25, 1974, a man unknown to him but later identified as Kenneth Atkins presented for payment a \$1,221.81 United States Treasury Veterans Administration education check payable to Robert M. Smith (12**). Two pieces of identification with the name Robert M. Smith (13) were presented with the check. Stein asked Atkins to sign the check, and Atkins did so, signing Smith's name (14). One of the pieces of identification had been erased, the address of the payee on the check was not the neighborhood of the store, and the check was dated thirteen days earlier (16-17). Suspicious of the circumstances, Stein called the postal inspector's office. Agents arrived and a few minutes later a second man entered the store. Stein identified appellant as the second man (21).

Robert Smith testified he was expecting a \$1,200 Veterans Administration check from the Federal government in June 1974 for payment of tuition at Bronx Community College (28). He testified that the check in question was the one he was expecting, and that he did not authorize appellant or Kenneth

*Prior to trial defense counsel made a motion to suppress statements given by appellant and the gun found in a pocket of the raincoat he was carrying. Counsel asserted that the arrest of appellant and his brother had been unlawful, requiring suppression of these evidentiary fruits.

**Numerals in parentheses refer to pages of the transcript of the trial dated August 5 and 6, 1974.

Atkins to cash it for him (28), and that the signature on the check was not his (30).

Anna Smith testified that on June 14, 1974, she opened her mailbox, removed the envelope containing the check, tore open the paper window, and replaced the check in the mailbox, which she then locked (34-35). When she returned later in the day to get the check, it was not in the mailbox (36).

Postal Inspector Edward Jones testified that he and his partner went to the check cashing store in response to Stein's call. Mr. Stein indicated that it was Kenneth Atkins* who was trying to cash the check in question. Inspector Jones asked the man his name, and Kenneth said "Smith."

Appellant then entered the store, stated that his name was Smith, and said he was the brother of the man trying to cash the check. At the agents' request, both appellant and Kenneth accompanied the agents to the Post Office.

Jones related the contents of the statement appellant gave at the Post Office. According to the confession, Kenneth took the check and together Kenneth and appellant tried unsuccessfully to cash it and share in the proceeds (52). In another attempt to cash the check, appellant and Kenneth were to go to a restaurant where, for a \$400 fee, the owner would cash it. While waiting for the owner of the restaurant to arrive, Kenneth went to the check cashing store (52).

*No one knew that Atkins was not Smith until later, when they all went to the Post Office.

Jones also testified that, in response to inquiry about whether he was armed, appellant took a pen gun from the pocket of the raincoat he was carrying (54). There was testimony that the gun was in operable condition (56), had no serial number (54), and was not registered (76).

Prior to presentation of the defense witnesses, appellant's counsel asked for a ruling on whether the Government would be permitted to introduce into evidence proof that appellant had escaped from a North Carolina work release program.* The Assistant United States Attorney argued that it was permissible cross-examination to show motive. He maintained that escaping precluded appellant and Kenneth from securing employment and that to get money they stole and tried to cash the check (87, 88). Defense counsel objected to the use of such evidence as being prejudicial and without relevance (88). The Judge ruled it a proper subject of cross-examination, saying, "It goes to the guts of the matter" (88). Again counsel objected (89).

In defense, Kenneth Atkins testified on behalf of his brother. Kenneth testified that he pleaded guilty to the crime of uttering a forged government obligation (95). He admitted taking the check from above the mailbox in his apartment building (100) and signing the check (95). He said he

*The Judge previously precluded examination on the underlying crime since it was on credibility only and the crime was classified a misdemeanor (83, 84, 88).

had not discussed with appellant the June 25 attempt to cash the check (101), nor had appellant been with him on the prior attempts to cash it (101).

He also stated that the pen gun was his and that he had put it in his, and not appellant's, raincoat pocket (100). He testified that appellant carried the raincoat in the check cashing store and in the car (117).

Kenneth testified that he had escaped from prison and that after his escape he lived with his parents. He testified that both of his parents then worked (124-25), his father as a transit patrolman, and that they supported him (106). He stated that his parents gave no indication that their support of him would stop (108), but that he got tired of taking their money (115).

Appellant testified that he had nothing to do with the check (132). He stated that while he and Kenneth were waiting for a friend he went inside a building, that when he returned he saw that his brother was gone, that he saw four men enter the check cashing store, that he went over to the store, saw his brother inside, entered the store, identified himself by the name Frank Atkins, and was then handcuffed and taken by the agents to the Post Office (128). At the Post Office he said "I did it" because the agents threatened his brother with fifteen years' imprisonment (119).

He testified that he took the gun from the pocket of the raincoat he was carrying. However, appellant stated it was

his brother's coat and he did not know there was a gun in the pocket until he got to the Post Office and felt something hit his leg (131).

On cross-examination, the Assistant United States Attorney inquired about appellant's efforts to find employment (133). Defense counsel's objection to this inquiry was overruled. Appellant explained that he could not take some jobs because of eczema and asthma (133), but that he had enough money to live (136). Defense counsel objected to any inquiry about appellant's prior custody (135). The prosecutor then asked if appellant had escaped from custody (135) and if that was why he could not get some jobs (136). The court stopped the inquiry when appellant said "no."

James Atkins, appellant's father, testified he was employed as a Transit Authority patrolman and that he had notified the appropriate officials of his sons' whereabouts after their unlawful return home (161), a fact known to appellant (152).

On re-direct examination, appellant testified that he left his camp to try to convince his brother, who had also left camp, to return, but that he was unsuccessful in doing so.

In his summation, the prosecutor argued from the evidence of the escape to show guilt:

Do you remember the testimony that both brothers were escapees from custody? Frank was in custody in North Carolina, Kenneth

was in custody in the Marine brig in Camp Lejeune and both had come to New York. Kenneth came in December and he said that he supported himself by taking money from his parents and that is what most 21 year-old people do and particularly if they are out of work and can't get a job if they are escapees from a military brig. It is pretty tough to get a job where you have to give a number. But Kenneth said he was relying upon his parents for money.

How long did he do that? Until June. When did Frank come back? Frank testified he came back to New York in May. Until he got together with his brother, Kenneth Atkins was doing fairly well. It is true he was an escapee from an institution but he didn't engage, according to his testimony, in any criminal acts. It wasn't until he hooked up again with his older brother that he and his brother took the check and devised a scheme to cash it.

What about Frank Atkins? He was in the same boat. He may have been in some sort of honor camp as he calls it but Frank Atkins was in custody. He was sentenced to three years in custody and he escaped from custody and came to New York and he may have called up, his father may have called up and informed the authorities but he never turned himself in. He never went down. He was in New York for two months and he came to convince his brother to go back to Camp Lejeune and failed but he never went back and went back into camp.

The Government would submit that his story that he was up for parole is simply a fabrication. He was in custody for three years and he had no way of knowing whether or not he would be paroled.

What did he do in New York, in Fun City this escapee from an institution, from a custodial facility with no money? He stole a check.

(184-86).

No charge on the use of this evidence was given to the jurors. After deliberation, the jury found appellant guilty of uttering a forged government obligation and possession of a weapon in violation of the Federal gun control laws.

ARGUMENT

IT WAS ERROR TO PERMIT INTO EVIDENCE PROOF
THAT APPELLANT HAD ESCAPED FROM CUSTODY.

The District Judge permitted the Government to introduce evidence of appellant's escape from an honors program in a North Carolina prison on the theory that the escape prevented appellant from obtaining employment, which produced poverty, which in turn generated a desire for money which resulted in the uttering of the check. The record shows, however, that the Government failed to produce any evidence that would permit such a chain of inferences (see 1 Wigmore, ON EVIDENCE, §117 at 557-659 (3d ed. 1940)), and the introduction of the fact of appellant's escape was so prejudicial that reversal is required.

The Government did not, and indeed could not, establish, even by inference, that the escape resulted in unemployment. To the contrary, appellant testified that although there were some jobs he could not perform because of eczema and asthma

(134-35), he was not unemployed because he had odd jobs (136). The Government also produced no evidence that appellant was impoverished. Again, to the contrary, the record shows that appellant was earning enough money at odd jobs to live (136). Further, the record establishes through Kenneth's testimony* that Kenneth lived with his parents (124-25), that both parents worked, that his father was a transit patrolman, and that his parents gave him money (106). There was no indication that this source of support would terminate (108). Thus, the fact that appellant's family was not in poverty precludes the inference that poverty caused criminal behavior.**

On this record, the jury was given no basis for making permissible inferences to support a connection between the escape and the crime charged. Thus, the only way the jurors could have handled the evidence of escape was to conclude that appellant was a bad man who would commit crimes. In fact, even in his summation the prosecutor abandoned his theory of admissibility and did not argue that the escape produced unemployment and poverty resulting in crime. Instead, he argued only that appellant was an escapee who did not return to the camp

*This testimony was given prior to the testimony concerning appellant's escape.

**Kenneth testified that he was tired of taking money from his parents (115). However, Kenneth's motivation is not proof of appellant's, and what is more, appellant had a source of income independent of his parents.

from which he had escaped. He argued that appellant's explanation for leaving custody was a lie. His one reference to poverty was to call appellant an escapee with no money -- a statement which is refuted by the record and which does not show the necessary connection between the two.*

Use of the fact of escape to show that appellant was an evil man is clearly improper (Michelson v. United States, 335 U.S. 469, 475 (1948)), and its lack of relevance for any other purpose was the basis of counsel's recurring objections.**

The prejudice to appellant from the admission of this evidence is apparent. The Government could produce no evidence of appellant's direct participation in the uttering in the check. The evidence of aiding and abetting rests virtually entirely on appellant's own confession. Appellant, however, explained in his testimony at trial that he made the confession to protect his brother and that he had, in fact, had nothing to do with the crime. Kenneth's trial testimony

*The prosecutor also compounded the "bad man" image by telling the jurors that Kenneth, who was convicted of robbery while in the Armed Forces, must have had a partner in that crime (181). From the fact that appellant was also in the Marines, the jury could have inferred that appellant was the partner, and thus counsel objected to this statement, which was without factual support. While the jury was told to disregard this argument by the judge (181), the impact must add to the "bad man" theory.

**Since the evidence here does not show motive, cases which permit admission of evidence to show motive do not help the Government, e.g., Cantrell v. United States, 323 F.2d 613 (D.C. Cir. 1963); United States v. Johnson, 254 F.2d 175 (2d Cir. 1948).

supported appellant's assertion of innocence.

The other piece of evidence relating to appellant's guilt -- whether appellant revealed his identity at the time he entered the check cashing store or stated that his name was Smith -- was also disputed. If, as appellant asserted, he said he was Atkins, that would be evidence that he did not know what his brother was doing in the store.

Since the improper admission of "bad man" evidence must have influenced the jury's appraisal of appellant's credibility, the conviction for violation of the gun laws must also be reversed. Appellant asserted that he did not know there was a gun in the raincoat pocket, and without that knowledge he was not guilty of the crime. Thus, credibility was critical on this count as well,* and the spillover effect of the improper evidence requires reversal.

Even without the spillover effect, it is proper to review the judgment on the uttering count and to reverse as to that. United States v. Adcock, 447 F.2d 1337 (2d Cir.), cert. denied, 404 U.S. 939 (1971); United States v. Febre, 425 F.2d 107, 113

*The jurors' acquittal of appellant of theft of mail could easily have come from the Government's failure to prove that crime rather than not crediting the defense. Mrs. Smith's testimony was that she opened the mailbox, tore open the envelope, and then replaced it. However, when she returned to pick up the mail, the letter was gone with no sign the mailbox had been broken into.

(2d Cir.), cert. denied, 400 U.S. 849 (1970).*

CONCLUSION

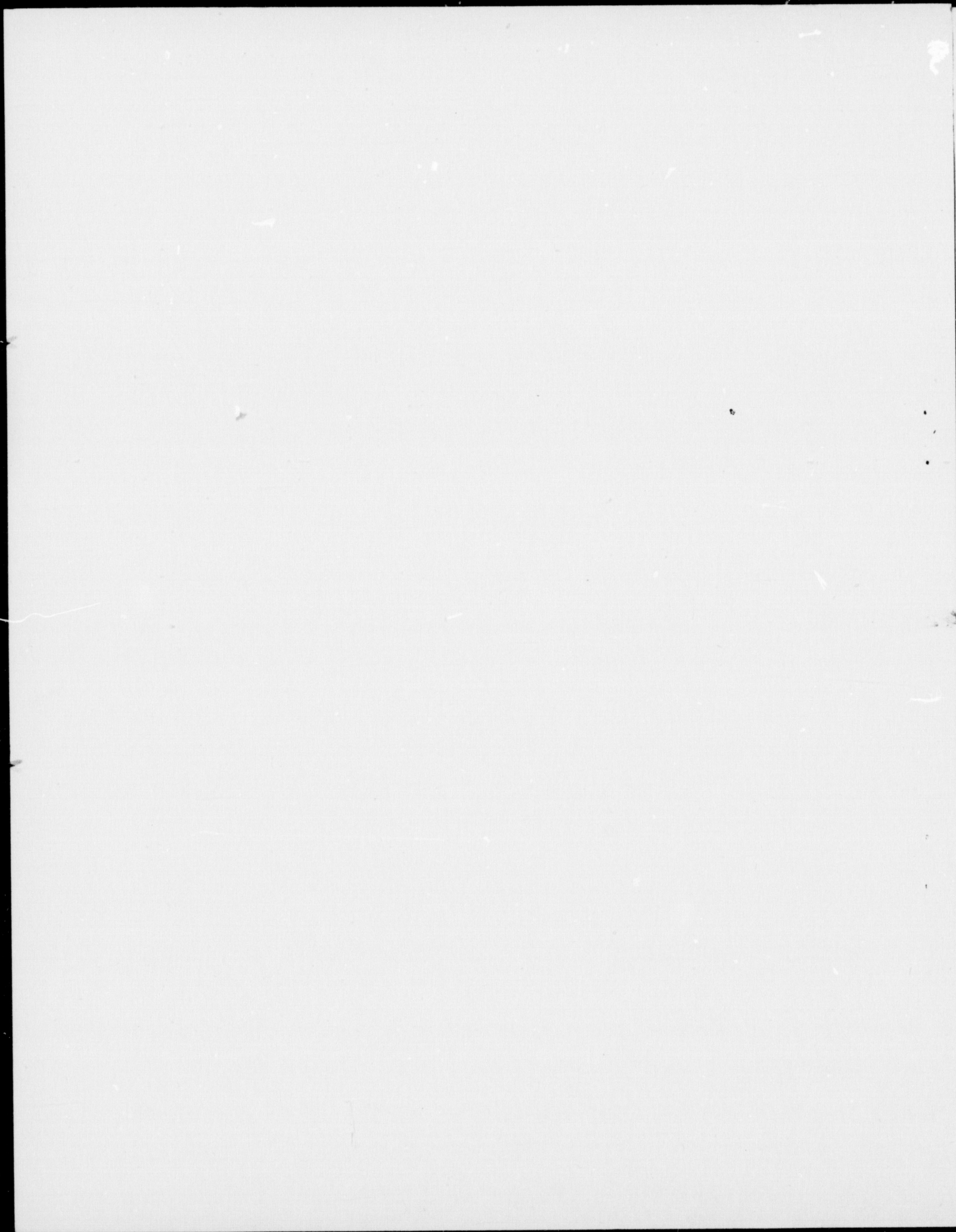
For the above-stated reasons, the judgment of the District Court should be reversed, and the case remanded for a new trial.

Respectfully submitted,

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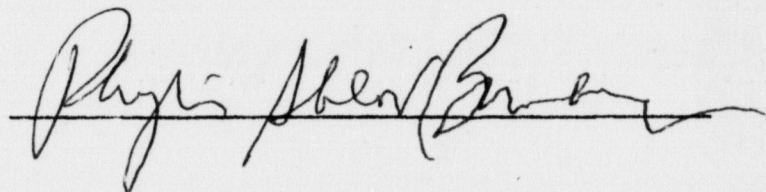
*In United States v. Gaines, 460 F.2d 176 (2d Cir.), cert. denied, 409 U.S. 883 (1972), there was no review of the issue because a review required a prior remand for a hearing which would produce no change in sentence. In the interest of preserving judicial efforts, this Court refused to remand, and affirmed the conviction. There is no such problem in this case. Further, the issue raised here is significant and is one in which guidance from this Court is needed.



Certificate of Service

October 16, 1974

I certify that a copy of this brief and appendix has been personally served on the office of the United States Attorney for the Southern District of New York.

A handwritten signature in cursive script, reading "Philip Allen Brown", is written over a horizontal line.